AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 11: The Contemporary Era—– Individual Rights/Personal Freedom and Public Morality/Gay Rights/States Debate Same-Sex Marriage

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In re Marriage Cases, 76 Cal.Rptr.3d 683 (2008)

Mayor Gavin Newsome of San Francisco, California, in 2004 ordered city officials to issue marriage licenses to same-sex couples on the ground that restricting marriage to opposite sex couples violated the equal protection clause of the California Constitution. Same-sex marriage opponents challenged this action in state courts. The Supreme Court of California ruled that a mayor had no authority to treat state laws as unconstitutional, but invited same-sex couples to initiate a legal challenge to California laws restricting marriage to a man and a woman. Numerous actions were filed almost immediately. A California trial court declared the state marriage law unconstitutional, but that decision was reversed by an intermediate state court. The losing parties, same-sex couples who wished to be married, appealed to the Supreme Court of California.

The Supreme Court of California by a 4–3 vote ruled that same-sex couples had a right to marry under the state constitution. Chief Justice George's opinion for the Court held that the right to marry established in Perez v. Sharp *(CA 1948) encompassed the right to marry a person of the same sex. George placed special emphasis on the unique provisions in California law and unique features of California constitutional history. One reason for doing so is the "adequate and independent state grounds" doctrine. The Supreme Court of the United States may not reverse a state court decision that is based on an interpretation of language in a state constitution and does not conflict with the Constitution of the United States, even if the Supreme Court interprets identical language in the federal Constitution differently. What did George think unique about California law and California constitutionalism? Why did the dissents disagree? Who had the better of the argument?*

Californians opposed to the decision in In re Marriage Cases *launched a campaign to reverse the decision by constitutional referendum. In 2008, California voters by a 52 to 48 percent vote passed Proposition 8. That ballot measure amended the state constitution to declare "only marriage between a man and a woman is valid or recognized in California." Proponents of same-sex marriage again took to the courts. In* Perry v. Schwarzenegger *(2010), a federal district court declared that Proposition 8 violated the equal protection clause of the Fourteenth Amendment. The Court of Appeals for the Ninth Circuit affirmed that decision in* Perry v. Brown *(2011).*

CHIEF JUSTICE GEORGE, delivered the opinion of the Court.

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From the beginning of California statehood, the legal institution of civil marriage has been understood to refer to a relationship between a man and a woman. . . . . .

. . . California recently has enacted comprehensive domestic partnership legislation that affords same-sex couples the opportunity, by entering into a domestic partnership, to obtain virtually all of the legal benefits, privileges, responsibilities, and duties that California law affords to and imposes upon married couples. The recent comprehensive domestic partnership legislation constitutes the culmination of a gradual expansion of rights that have been made available in this state to same-sex couples who choose to register as domestic partners. . . .

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While acknowledging that the [California] Domestic Partner [Rights and Responsibilities] Act [of 2003] affords substantial benefits to same-sex couples, plaintiffs repeatedly characterize that legislation as granting same-sex couples only the "material" or "tangible" benefits of marriage. At least in some

respects, this characterization inaccurately minimizes the scope and nature of the benefits and responsibilities afforded by California's domestic partnership law. The broad reach of this legislation extends to the extremely wide network of statutory provisions, common law rules, and administrative practices that give substance to the legal institution of civil marriage, including, among many others, various rules and policies concerning parental rights and responsibilities affecting the raising of children, mutual duties of respect, fidelity and support, the fiduciary relationship between partners, the privileged nature of confidential communications between partners, and a partner's authority to make health care decisions when his or her partner is unable to act for himself or herself. These legal rights and responsibilities embody more than merely the "material" or "tangible" financial benefits that are extended by government to married couples. As we [previously] explained: "[T]he decision . . . to enter into a domestic partnership is more than a change in the legal status of individuals. . . . [T]he consequence[ ] of the decision is the creation of a new family unit with all of its implications in terms of personal commitment as well as legal rights and obligations."

The nature and breadth of the rights afforded same-sex couples under the Domestic Partner Act is significant, because under California law the scope of that enactment is directly relevant to the question of the constitutional validity of the provisions in California's marriage statutes limiting marriage to opposite-sex couples. As this court explained [previously]: "In determining the scope of the class singled out for special burdens or benefits, a court cannot confine its view to the terms of the specific statute under attack, but must judge the enactment's operation against the background of other legislative, administrative and judicial directives which govern the legal rights of similarly situated persons. . . .

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Although our state Constitution does not contain any explicit reference to a "right to marry," past California cases establish beyond question that the right to marry is a fundamental right whose protection is guaranteed to all persons by the California Constitution. . . .

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Plaintiffs challenge the . . . characterization of the constitutional right they seek to invoke as the right to same-sex marriage, and on this point we agree with plaintiffs' position. In *Perez v. Sharp*, . . . this court's 1948 decision holding that the California statutory provisions prohibiting interracial marriage were unconstitutional—the court did not characterize the constitutional right that the plaintiffs in that case sought to obtain as "a right to interracial marriage" and did not dismiss the plaintiffs' constitutional challenge on the ground that such marriages never had been permitted in California. Instead, the *Perez* decision focused on the substance of the constitutional right at issue—that is, the importance to an individual of the freedom "to join in marriage *with the person of one's choice*"—in determining whether the statute impinged upon the plaintiffs' fundamental constitutional right. . . .

The flaw in characterizing the constitutional right at issue as the right to same-sex marriage rather than the right to marry goes beyond mere semantics. It is important both analytically and from the standpoint of fairness to plaintiffs' argument that we recognize they are not seeking to create a new constitutional right—the right to "same-sex marriage"—or to change, modify, or (as some have suggested) "deinstitutionalize" the existing institution of marriage. Instead, plaintiffs contend that, properly interpreted, the state constitutional right to marry affords same-sex couples the same rights and benefits—accompanied by the same mutual responsibilities and obligations—as this constitutional right affords to opposite-sex couples. . . .

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Like *Perez*, subsequent California decisions discussing the nature of marriage and the right to marry have recognized repeatedly the linkage between marriage, establishing a home, and raising children in identifying civil marriage as the means available to an individual to establish, with a loved one of his or her choice, an officially recognized family relationship. [Judge George then cited numerous California cases pointing to the centrality of marriage to individuals.] . . .

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Society is served by the institution of civil marriage in many ways. Society, of course, has an overriding interest in the welfare of children, and the role marriage plays in facilitating a stable family setting in which children may be raised by two loving parents unquestionably furthers the welfare of

children and society. In addition, the role of the family in educating and socializing children serves society's interest by perpetuating the social and political culture and providing continuing support for society over generations. It is these features that the California authorities have in mind in describing marriage as the "basic unit" or "building block" of society. . . . Furthermore, the legal obligations of support that are an integral part of marital and family relationships relieve society of the obligation of caring for individuals who may become incapacitated or who are otherwise unable to support themselves. . . .

Although past California cases emphasize that marriage is an institution in which society as a whole has a vital interest, our decisions at the same time recognize that the legal right and opportunity to enter into such an officially recognized relationship also is of overriding importance to the individual and to the affected couple. As noted above, past California decisions have described marriage as "the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime.". . . The ability of an individual to join in a committed, long-term, officially recognized family relationship with the person of his or her choice is often of crucial significance to the individual's happiness and well-being. The legal commitment to long-term mutual emotional and economic support that is an integral part of an officially recognized marriage relationship provides an individual with the ability to invest in and rely upon a loving relationship with another adult in a way that may be crucial to the individual's development as a person and achievement of his or her full potential.

Further, entry into a formal, officially recognized family relationship provides an individual with the opportunity to become a part of one's partner's family, providing a wider and often critical network of economic and emotional security. . . . The opportunity of a couple to establish an officially recognized family of their own not only grants access to an extended family but also permits the couple to join the broader family social structure that is a significant feature of community life. Moreover, the opportunity to publicly and officially express one's love for and long-term commitment to another person by establishing a family together with that person also is an important element of self-expression that can give special meaning to one's life. Finally, of course, the ability to have children and raise them with a loved one who can share the joys and challenges of that endeavor is without doubt a most valuable component of one's liberty and personal autonomy. Although persons can have children and raise them outside of marriage, the institution of civil marriage affords official governmental sanction and sanctuary to the family unit, granting a parent the ability to afford his or her children the substantial benefits that flow from a stable two-parent family environment, a ready and public means of establishing to others the legal basis of one's parental relationship to one's children . . . and the additional security that comes from the knowledge that his or her parental relationship with a child will be afforded protection by the government against the adverse actions or claims of others. . . .

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If civil marriage were an institution whose only role was to serve the interests of society, it reasonably could be asserted that the state should have full authority to decide whether to establish or abolish the institution of marriage (and any similar institution, such as domestic partnership). In recognizing, however, that the right to marry is a basic, constitutionally protected civil right—"a fundamental right of free men [and women]," . . . the governing California cases establish that this right embodies fundamental interests of an individual that are protected from abrogation or elimination by the state.

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Although the constitutional right to marry clearly does not obligate the state to afford specific tax or other governmental benefits on the basis of a couple's family relationship, the right to marry does obligate the state to take affirmative action to grant official, public recognition to the couple's relationship as a family . . . as well as to protect the core elements of the family relationship from at least some types of improper interference by others. . . . This constitutional right also has the additional affirmative substantive effect of providing assurance to each member of the relationship that the government will enforce the mutual obligations between the partners (and to their children) that are an important aspect of the commitments upon which the relationship rests. . . .

In light of the fundamental nature of the substantive rights embodied in the right to marry—and

their central importance to an individual's opportunity to live a happy, meaningful, and satisfying life as a full member of society—the California Constitution properly must be interpreted to guarantee this basic civil right to all individuals and couples, without regard to their sexual orientation.

It is true, of course, that as an historical matter in this state marriage always has been limited to a union between a man and a woman. Tradition alone, however, generally has not been viewed as a sufficient justification for perpetuating, without examination, the restriction or denial of a fundamental constitutional right. As this court observed in *People v. Belous* (CA 1969), "[c]onstitutional concepts are not static. . . . 'In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights.'" . . .

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. . . The capability of gay individuals to enter into loving and enduring relationships comparable to those entered into by heterosexuals is in no way dependent upon the enactment of the Domestic Partner Act; the adoption of that legislation simply constitutes an explicit official recognition of that capacity. Similarly, the numerous recent legislative enactments prohibiting discrimination on the basis of sexual orientation were not required in order to confer upon gay individuals a legal status equal to that enjoyed by heterosexuals; these measures simply provide explicit official recognition of, and affirmative support for, that equal legal status. Indeed, the change in this state's past treatment of gay individuals and homosexual conduct is reflected in scores of legislative, administrative, and judicial actions that have occurred over the past 30 or more years. . . . Thus, just as this court recognized in *Perez* that it was not constitutionally permissible to continue to treat racial or ethnic minorities as inferior . . . and in *Sail'er Inn* that it was not constitutionally acceptable to continue to treat women as less capable than and unequal to men, we now similarly recognize that an individual's homosexual orientation is not a constitutionally legitimate basis for withholding or restricting the individual's legal rights.

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The Proposition 22 Legal Defense Fund and the Campaign . . . contend that the only family that possibly can be encompassed by the constitutional right to marry is a family headed by a man and a woman. Pointing out that past cases often have linked marriage and procreation, these parties argue that because only a man and a woman can produce children biologically with one another, the constitutional right to marry necessarily is limited to opposite-sex couples.

This contention is fundamentally flawed for a number of reasons. To begin with, although the legal institution of civil marriage may well have originated in large part to promote a stable relationship for the procreation and raising of children. . . . the constitutional right to marry never has been viewed as the sole preserve of individuals who are physically capable of having children. Men and women who desire to raise children with a loved one in a recognized family but who are physically unable to conceive a child with their loved one never have been excluded from the right to marry. . . . There is . . . no authority whatsoever to support the proposition that an individual who is physically incapable of bearing children does not possess a fundamental constitutional right to marry. . . . A person who is physically incapable of bearing children still has the potential to become a parent and raise a child through adoption or through means of assisted reproduction, and the constitutional right to marry ensures the individual the opportunity to raise children in an officially recognized family with the person with whom the individual has chosen to share his or her life. Thus, although an important purpose underlying marriage may be to channel procreation into a stable family relationship, that purpose cannot be viewed as limiting the constitutional right to marry to couples who are capable of biologically producing a child together.

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Furthermore, although promoting and facilitating a stable environment for the procreation and raising of children is unquestionably one of the vitally important purposes underlying the institution of marriage and the constitutional right to marry, past cases make clear that this right is not confined to, or restrictively defined by, that purpose alone. . . . The personal enrichment afforded by the right to marry may be obtained by a couple whether or not they choose to have children, and the right to marry never has been limited to those who plan or desire to have children. Indeed, in *Griswold v. Connecticut* (1965) . . .,

one of the seminal federal cases striking down a state law as violative of the federal constitutional right of privacy—the high court upheld a married couple's right to use contraception to prevent procreation, demonstrating quite clearly that the promotion of procreation is not the sole or defining purpose of marriage. . . .

. . . Our recognition that the core substantive rights encompassed by the constitutional right to marry apply to same-sex as well as opposite-sex couples does not imply in any way that it is unimportant or immaterial to the state whether a child is raised by his or her biological mother and father. By recognizing this circumstance we do not alter or diminish either the legal responsibilities that biological parents owe to their children or the substantial incentives that the state provides to a child's biological parents to enter into and raise their child in a stable, long-term committed relationship. Instead, such an interpretation of the constitutional right to marry simply confirms that a stable two-parent family relationship, supported by the state's official recognition and protection, is equally as important for the numerous children in California who are being raised by same-sex couples as for those children being raised by opposite-sex couples (whether they are biological parents or adoptive parents). This interpretation also guarantees individuals who are in a same-sex relationship, and who are raising children, the opportunity to obtain from the state the official recognition and support accorded a family by agreeing to take on the substantial and long-term mutual obligations and responsibilities that are an essential and inseparable part of a family relationship.

Accordingly, we conclude that the right to marry, as embodied in article I, sections 1 and 7 of the California Constitution, guarantees same-sex couples the same substantive constitutional rights as opposite-sex couples to choose one's life partner and enter with that person into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage.

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Whether or not the name "marriage," in the abstract, is considered a core element of the state constitutional right to marry, one of the core elements of this fundamental right is the right of same-sex couples to have their official family relationship accorded the same dignity, respect, and stature as that accorded to all other officially recognized family relationships. The current statutes—by drawing a distinction between the name assigned to the family relationship available to opposite-sex couples and the name assigned to the family relationship available to same-sex couples, and by reserving the historic and highly respected designation of marriage exclusively to opposite-sex couples while offering same-sex couples only the new and unfamiliar designation of domestic partnership—pose a serious risk of denying the official family relationship of same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry. As observed by the City at oral argument, this court's conclusion in *Perez* . . . that the statutory provision barring interracial marriage was unconstitutional, undoubtedly would have been the same even if alternative nomenclature, such as "transracial union," had been made available to interracial couples.

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The current statutory assignment of different names for the official family relationships of opposite-sex couples on the one hand, and of same-sex couples on the other, raises constitutional concerns not only in the context of the state constitutional right to marry, but also under the state constitutional equal protection clause. . . .

. . .

Plaintiffs initially contend that the relevant California statutes, by drawing a distinction between couples consisting of a man and a woman and couples consisting of two persons of the same sex or gender, discriminate on the basis of sex and for that reason should be subjected to strict scrutiny under the state equal protection clause. Although the governing California cases long have established that statutes that discriminate on the basis of sex or gender are subject to strict scrutiny under the California Constitution . . . , we conclude that the challenged statutes cannot properly be viewed as discriminating on the basis of sex or gender for purposes of the California equal protection clause.

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. . . [T]he challenged marriage statutes do not treat men and women differently. Persons of either

gender are treated equally and are permitted to marry only a person of the opposite gender. In light of the equality of treatment between genders, the distinction prescribed by the relevant statutes plainly does not constitute discrimination on the basis of sex as that concept is commonly understood.

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The decisions in *Perez* and *Loving v. Virginia* (1967) . . . are clearly distinguishable from this case, because the antimiscegenation statutes at issue in those cases plainly treated members of minority races differently from White persons, prohibiting only intermarriage that involved White persons in order to prevent (in the undisguised words of the defenders of the statute in Perez) "the Caucasian race from being contaminated by races whose members are by nature physically and mentally inferior to Caucasians." . . . Under these circumstances, there can be no doubt that the reference to race in the statutes at issue in Perez and Loving unquestionably reflected the kind of racial discrimination that always has been recognized as calling for strict scrutiny under equal protection analysis.

. . . [C]ourts have recognized that a statute that treats a couple differently based upon whether the couple consists of persons of the same race or of different races generally reflects a policy disapproving of the integration or close relationship of individuals of different races in the setting in question, and as such properly is viewed as embodying an instance of *racial discrimination* with respect to the interracial couple and both of its members. By contrast, past judicial decisions, in California and elsewhere, virtually uniformly hold that a statute or policy that treats men and women equally but that accords differential treatment either to a couple based upon whether it consists of persons of the same sex rather than opposite sexes, or to an individual based upon whether he or she generally is sexually attracted to persons of the same gender rather than the opposite gender, is more accurately characterized as involving differential treatment on the basis of *sexual orientation* rather than an instance of *sex discrimination*, and properly should be analyzed on the *former* ground. These cases recognize that, in realistic terms, a statute or policy that treats same-sex couples differently from opposite-sex couples, or that treats individuals who are sexually attracted to persons of the same gender differently from individuals who are sexually attracted to persons of the opposite gender, does not treat an individual man or an individual woman differently *because of* his or her *gender* but rather accords differential treatment *because of* the individual's *sexual orientation*.

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For purposes of determining the applicable standard of judicial review under the California equal protection clause, we conclude that discrimination on the basis of sexual orientation cannot appropriately be viewed as a subset of, or subsumed within, discrimination on the basis of sex. The seminal California decisions that address the question of which equal protection standard should apply to statutory classifications that discriminate on the basis of sex or gender, and that explain why under the California Constitution the strict scrutiny standard is applicable to such classifications, look to (1) whether a person's gender (rather than sexual orientation) does or does not bear a relation to one's ability to perform or contribute to society, and (2) the long history of societal and legal discrimination against women (rather than against gay individuals). . . . Each of these seminal California decisions addressed instances in which the applicable statutes favored one gender over another, or prescribed different treatment for one gender as compared to the other based upon a stereotype relating to one particular gender, rather than instances in which a statute treated the genders equally but imposed differential treatment based upon whether or not an individual was of the same gender as his or her sexual partner. . . . In light of the reasoning underlying these rulings, we conclude that the type of discrimination or differential treatment between same-sex and opposite-sex couples reflected in the challenged marriage statutes cannot fairly be viewed as embodying the same type of discrimination at issue in the California decisions establishing that the strict scrutiny standard applies to statutes that discriminate on the basis of sex.

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In arguing that the marriage statutes do not discriminate on the basis of sexual orientation, defendants rely upon the circumstance that these statutes, on their face, do not refer explicitly to sexual orientation and do not prohibit gay individuals from marrying a person of the opposite sex. Defendants contend that under these circumstances, the marriage statutes should not be viewed as directly

classifying or discriminating on the basis of sexual orientation but at most should be viewed as having a "disparate impact" on gay persons.

In our view, the statutory provisions restricting marriage to a man and a woman cannot be understood as having merely a disparate impact on gay persons, but instead properly must be viewed as directly classifying and prescribing distinct treatment on the basis of sexual orientation. By limiting marriage to opposite-sex couples, the marriage statutes, realistically viewed, operate clearly and directly to impose different treatment on gay individuals because of their sexual orientation. . . . In our view, it is sophistic to suggest that this conclusion is avoidable by reason of the circumstance that the marriage statutes permit a gay man or a lesbian to marry someone of the opposite sex, because making such a choice would require the negation of the person's sexual orientation. . . .

. . . [W]e conclude that sexual orientation should be viewed as a suspect classification for purposes of the California Constitution's equal protection clause and that statutes that treat persons differently because of their sexual orientation should be subjected to strict scrutiny under this constitutional provision.

. . . Past California cases fully support the . . . conclusion that sexual orientation is a characteristic (1) that bears no relation to a person's ability to perform or contribute to society . . . and (2) that is associated with a stigma of inferiority and second-class citizenship, manifested by the group's history of legal and social disabilities. . . .

We disagree . . . that it is appropriate to reject sexual orientation as a suspect classification, in applying the California Constitution's equal protection clause, on the ground that there is a question as to whether this characteristic is or is not "immutable." . . . [I]mmutability is not invariably required in order for a characteristic to be considered a suspect classification for equal protection purposes. California cases establish that a person's religion is a suspect classification for equal protection purposes . . . , and one's religion, of course, is not immutable but is a matter over which an individual has control. . . . Because a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment. . . .

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Although some California decisions in discussing suspect classifications have referred to a group's "political powerlessness," . . . our cases have not identified a group's *current* political powerlessness as a necessary *prerequisite* for treatment as a suspect class. Indeed, if a group's current political powerlessness were a prerequisite to a characteristic's being considered a constitutionally suspect basis for differential treatment, it would be impossible to justify the numerous decisions that continue to treat sex, race, and religion as suspect classifications. Instead, our decisions make clear that the most important factors in deciding whether a characteristic should be considered a constitutionally suspect basis for classification are whether the class of persons who exhibit a certain characteristic historically has been subjected to invidious and prejudicial treatment, and whether society now recognizes that the characteristic in question generally bears no relationship to the individual's ability to perform or contribute to society. Thus, "courts must look closely at classifications based on that characteristic lest *outdated* social stereotypes result in invidious laws or practices.". . . This rationale clearly applies to statutory classifications that mandate differential treatment on the basis of sexual orientation.

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. . . In enforcing the California Constitution's equal protection clause, however, past California cases have not applied an intermediate scrutiny standard of review to classifications involving any suspect (or quasi-suspect) characteristic. Unlike decisions applying the federal equal protection clause, California cases continue to review, under strict scrutiny rather than intermediate scrutiny, those statutes that impose differential treatment on the basis of sex or gender. . . .

There is no persuasive basis for applying to statutes that classify persons on the basis of the suspect classification of sexual orientation a standard less rigorous than that applied to statutes that classify on the basis of the suspect classifications of gender, race, or religion. Because sexual orientation, like gender, race, or religion, is a characteristic that frequently has been the basis for biased and improperly stereotypical treatment and that generally bears no relation to an individual's ability to

perform or contribute to society, it is appropriate for courts to evaluate with great care and with considerable skepticism any statute that embodies such a classification. The strict scrutiny standard therefore is applicable to statutes that impose differential treatment on the basis of sexual orientation.

. . . [Justice Baxter then considered whether strict scrutiny should apply because plaintiffs were being denied a fundamental right]

[A]ffording same-sex couples access only to the separate institution of domestic partnership, and denying such couples access to the established institution of marriage, properly must be viewed as impinging upon the right of those couples to have their family relationship accorded respect and dignity equal to that accorded the family relationship of opposite-sex couples.

First, because of the long and celebrated history of the term "marriage" and the widespread understanding that this term describes a union unreservedly approved and favored by the community, there clearly is a considerable and undeniable symbolic importance to this designation. Thus, it is apparent that affording access to this designation exclusively to opposite-sex couples, while providing same-sex couples access to only a novel alternative designation, realistically must be viewed as constituting significantly unequal treatment to same-sex couples. In this regard, plaintiffs persuasively invoke by analogy the decisions of the United States Supreme Court finding inadequate a state's creation of a separate law school for Black students rather than granting such students access to the University of Texas Law School (*Sweatt v. Painter* [1950]) . . . and a state's founding of a separate military program for women rather than admitting women to the Virginia Military Institute (*United States v. Virginia* [1996]). As plaintiffs maintain, these high court decisions demonstrate that even when the state grants ostensibly equal benefits to a previously excluded class through the creation of a new institution, the intangible symbolic differences that remain often are constitutionally significant.

Second, particularly in light of the historic disparagement of and discrimination against gay persons, there is a very significant risk that retaining a distinction in nomenclature with regard to this most fundamental of relationships whereby the term "marriage" is denied only to same-sex couples inevitably will cause the new parallel institution that has been made available to those couples to be viewed as of a lesser stature than marriage and, in effect, as a mark of second-class citizenship. . . .

Third, it also is significant that although the meaning of the term "marriage" is well understood by the public generally, the status of domestic partnership is not. While it is true that this circumstance may change over time, it is difficult to deny that the unfamiliarity of the term "domestic partnership" is likely, for a considerable period of time, to pose significant difficulties and complications for same-sex couples, and perhaps most poignantly for their children, that would not be presented if, like opposite-sex couples, same-sex couples were permitted access to the established and well-understood family relationship of marriage.

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. . . Plaintiffs point out that one consequence of the coexistence of two parallel types of familial relationship is that—in the numerous everyday social, employment, and governmental settings in which an individual is asked whether he or she "is married or single"—an individual who is a domestic partner and who accurately responds to the question by disclosing that status will (as a realistic matter) be disclosing his or her homosexual orientation, even if he or she would rather not do so under the circumstances and even if that information is totally irrelevant in the setting in question. Because the constitutional right of privacy ordinarily would protect an individual from having to disclose his or her sexual orientation under circumstances in which that information is irrelevant . . . , the existence of two separate family designations—one available only to opposite-sex couples and the other to same-sex couples—impinges upon this privacy interest, and may expose gay individuals to detrimental treatment by those who continue to harbor prejudices that have been rejected by California society at large.

For all of these reasons, we conclude that the classifications and differential treatment embodied in the relevant statutes significantly impinge upon the fundamental interests of same-sex couples, and accordingly provide a further reason requiring that the statutory provisions properly be evaluated under the strict scrutiny standard of review.

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[T]he question before us is whether the state has a constitutionally *compelling* interest in reserving

the designation of marriage only for opposite-sex couples and excluding same-sex couples from access to that designation, and whether this statutory restriction is *necessary* to serve a compelling state interest.

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Although . . . we agree with the Attorney General and the Governor that the separation-of-powers doctrine precludes a court from "redefining" marriage on the basis of the court's view that public policy or the public interest would be better served by such a revision, we disagree with the Attorney General and the Governor to the extent they suggest that the traditional or long-standing nature of the current statutory definition of marriage exempts the statutory provisions embodying that definition from the constraints imposed by the California Constitution, or that the separation-of-powers doctrine precludes a court from determining that constitutional question. On the contrary, under "the constitutional theory of 'checks and balances' that the separation-of-powers doctrine is intended to serve" . . ., a court has an obligation to enforce the limitations that the California Constitution imposes upon legislative measures, and a court would shirk the responsibility it owes to each member of the public were it to consider such statutory provisions to be insulated from judicial review.

. . .

. . . [H]istory belies the notion that any element that traditionally has been viewed as an integral or definitional feature of marriage constitutes an impermissible subject of judicial scrutiny. Many examples exist of legal doctrines that once were viewed as central components of the civil institution of marriage—such as the doctrine of coverture under which the wife's legal identity was treated as merged into that of her husband, whose property she became, or the doctrine of recrimination which significantly limited the circumstances under which a marriage could be legally terminated, or the numerous legal rules based upon the differing roles historically occupied by a man and by a woman in the marriage relationship and in family life generally. Courts have not hesitated to subject such legal doctrines to judicial scrutiny when the fairness or continuing validity of the doctrine or rule was challenged, on occasion ultimately modifying or invalidating it as a result of such judicial scrutiny. . . . Accordingly, we reject the contention that the separation-of-powers doctrine renders judicial scrutiny improper because the statutory provisions in question embody an integral aspect of the definition of marriage.

. . .

In defending the state's proffered interest in retaining the traditional definition of marriage as limited to a union between a man and a woman, the Attorney General and the Governor rely primarily upon the historic and well-established nature of this limitation and the circumstance that the designation of marriage continues to apply only to a relationship between opposite-sex couples in the overwhelming majority of jurisdictions in the United States and around the world. Because, until recently, there has been widespread societal disapproval and disparagement of homosexuality in many cultures, it is hardly surprising that the institution of civil marriage generally has been limited to opposite-sex couples and that many persons have considered the designation of marriage to be appropriately applied only to a relationship of an opposite-sex couple.

Although the understanding of marriage as limited to a union of a man and a woman is undeniably the predominant one, if we have learned anything from the significant evolution in the prevailing societal views and official policies toward members of minority races and toward women over the past half-century, it is that even the most familiar and generally accepted of social practices and traditions often mask an unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions. It is instructive to recall in this regard that the traditional, well-established legal rules and practices of our not-so-distant past (1) barred interracial marriage, (2) upheld the routine exclusion of women from many occupations and official duties, and (3) considered the relegation of racial minorities to separate and assertedly equivalent public facilities and institutions as constitutionally equal treatment. . . . For this reason, the interest in retaining a tradition that excludes an historically disfavored minority group from a status that is extended to all others—even when the tradition is long-standing and widely shared—does not necessarily represent a compelling state interest for purposes of equal protection analysis.

After carefully evaluating the pertinent considerations in the present case, we conclude that the state interest in limiting the designation of marriage exclusively to opposite-sex couples, and in excluding

same-sex couples from access to that designation, cannot properly be considered a compelling state interest for equal protection purposes. To begin with, the limitation clearly is not necessary to preserve the rights and benefits of marriage currently enjoyed by opposite-sex couples. Extending access to the designation of marriage to same-sex couples will not deprive any opposite-sex couple or their children of any of the rights and benefits conferred by the marriage statutes, but simply will make the benefit of the marriage designation available to same-sex couples and their children. As Chief Judge Kaye of the New York Court of Appeals succinctly observed in her dissenting opinion in *Hernandez v. Robles* (NY 2006): "There are enough marriage licenses to go around for everyone." Further, permitting same-sex couples access to the designation of marriage will not alter the substantive nature of the legal institution of marriage; same-sex couples who choose to enter into the relationship with that designation will be subject to the same duties and obligations to each other, to their children, and to third parties that the law currently imposes upon opposite-sex couples who marry. Finally, affording same-sex couples the opportunity to obtain the designation of marriage will not impinge upon the religious freedom of any religious organization, official, or any other person; no religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs. . . .

While retention of the limitation of marriage to opposite-sex couples is not needed to preserve the rights and benefits of opposite-sex couples, the exclusion of same-sex couples from the designation of marriage works a real and appreciable harm upon same-sex couples and their children. As discussed above, because of the long and celebrated history of the term "marriage" and the widespread understanding that this word describes a family relationship unreservedly sanctioned by the community, the statutory provisions that continue to limit access to this designation exclusively to opposite-sex couples—while providing only a novel, alternative institution for same-sex couples—likely will be viewed as an official statement that the family relationship of same-sex couples is not of comparable stature or equal dignity to the family relationship of opposite-sex couples. Furthermore, because of the historic disparagement of gay persons, the retention of a distinction in nomenclature by which the term "marriage" is withheld only from the family relationship of same-sex couples is all the more likely to cause the new parallel institution that has been established for same-sex couples to be considered a mark of second-class citizenship. Finally, in addition to the potential harm flowing from the lesser stature that is likely to be afforded to the family relationships of same-sex couples by designating them domestic partnerships, there exists a substantial risk that a judicial decision upholding the differential treatment of opposite-sex and same-sex couples would be understood as *validating* a more general proposition that our state by now has repudiated: that it is permissible, under the law, for society to treat gay individuals and same-sex couples differently from, and less favorably than, heterosexual individuals and opposite-sex couples.

In light of all of these circumstances, we conclude that retention of the traditional definition of marriage does not constitute a state interest sufficiently compelling, under the strict scrutiny equal protection standard, to justify withholding that status from same-sex couples.

. . .

WE CONCUR: JUSTICES KENNARD, WERDEGAR and MORENO.

JUSTICE KENNARD, concurring.

. . .

JUSTICE BAXTER, concurring and dissenting.

. . . I cannot join the majority's holding that the California Constitution gives same-sex couples a right to marry. In reaching this decision, I believe, the majority violates the separation of powers, and thereby commits profound error.

. . . Nothing in our Constitution, express or implicit, compels the majority's startling conclusion

that the age-old understanding of marriage—an understanding recently confirmed by an initiative law—is no longer valid. California statutes already recognize same-sex unions and grant them all the substantive legal rights this state can bestow. If there is to be a further sea change in the social and legal understanding of marriage itself, that evolution should occur by similar democratic means. The majority forecloses this ordinary democratic process, and, in doing so, oversteps its authority.

. . .

The People, directly or through their elected representatives, have every right to adopt laws abrogating the historic understanding that civil marriage is between a man and a woman. The rapid growth in California of statutory protections for the rights of gays and lesbians, as individuals, as parents, and as committed partners, suggests a quickening evolution of community attitudes on these issues. Recent years have seen the development of an intense debate about same-sex marriage. Advocates of this cause have had real success in the marketplace of ideas, gaining attention and considerable public support. Left to its own devices, the ordinary democratic process might well produce, ere long, a consensus among most Californians that the term "marriage" should, in civil parlance, include the legal unions of same-sex partners.

But a bare majority of this court, not satisfied with the pace of democratic change, now abruptly forestalls that process and substitutes, by judicial fiat, its own social policy views for those expressed by the People themselves. Undeterred by the strong weight of state and federal law and authority, the majority invents a new constitutional right, immune from the ordinary process of legislative consideration. The majority finds that our Constitution suddenly demands no less than a permanent redefinition of marriage, regardless of the popular will.

. . .

The California Constitution says nothing about the rights of same-sex couples to marry. On the contrary, as the majority concedes, our original Constitution, effective from the moment of statehood, evidenced an assumption that marriage was between partners of the opposite sex. . . .

. . .

It is beyond dispute . . . that there is no deeply rooted tradition of same-sex marriage, in the nation or in this state. Precisely the opposite is true. The concept of same-sex marriage was unknown in our distant past, and is novel in our recent history, because the universally understood definition of marriage has been the legal or religious union of a man and a woman.

. . .

The Legislature has indeed granted many rights to gay and lesbian individuals, including the right to enter same-sex legal unions with all the substantive rights and benefits of civil marriage. As the majority elsewhere acknowledges, however, our current statutory scheme, which includes an initiative measure enacted by the People, specifically reserves marriage itself for opposite-sex unions. . . . Under these circumstances, it is difficult to see how our legislative history reflects a current community value in favor of same-sex marriage that must now be enshrined in the Constitution.

Of even greater concern is the majority's mode of analysis, which places heavy reliance on statutory law to establish a constitutional right. When a pattern of legislation makes current community values clear, the majority seems to say, those values can become locked into the Constitution itself.

Of course, only the People can amend the Constitution; the Legislature has no unilateral power to do so. . . . However, the effect of the majority's reasoning is to suggest that the Legislature can accomplish such amendment indirectly, whether it intends to do so or not, by reflecting current community attitudes in the laws it enacts.

. . .

Though the majority insists otherwise, plaintiffs seek, and the majority grants, a *new* right to *same-sex* marriage that only recently has been urged upon our social and legal system. Because civil marriage is an institution historically defined as the legal union of a man and a woman, plaintiffs could not succeed except by convincing this court to insert in our Constitution an altered and expanded definition of marriage—one that includes same-sex partnerships for the first time. By accepting that invitation, the majority places this controversial issue beyond the realm of legislative debate and substitutes its own judgment in the matter for the considered wisdom of the People and their elected

representatives. The majority advances no persuasive reason for taking that step.

In support of its view that marriage is a constitutional entitlement without regard for the genders of the respective partners, the majority cites the many California and federal decisions broadly describing the basic rights of personal autonomy and family intimacy, including the right to marry, procreate, establish a home, and bring up children. . . . However, none of the cited decisions holds, or remotely suggests, that any right to marry recognized by the Constitution extends beyond the traditional definition of marriage to include same-sex partnerships.

Certainly *Perez v. Sharp* (1948) . . . does not support the majority's expansive view. There we struck down racial restrictions on the right of a man and a woman to marry. But nothing in Perez suggests an intent to alter the definition of marriage as a union of opposite-sex partners. In sum, there is no convincing basis in federal or California jurisprudence for the majority's claim that same-sex couples have a fundamental constitutional right to marry.

. . . I [also] disagree that sexual orientation is a suspect classification. Hence, as with the majority's due process theory, I would not apply strict scrutiny, and would uphold the statutory scheme as reasonable. I explain my conclusions.

. . .

. . . [S]ame-sex couples and opposite-sex couples are not similarly situated. . . . [T]he state has a legitimate interest in enforcing the express legislative and popular will that the traditional definition of marriage be preserved. Same-sex and opposite-sex couples cannot be similarly situated for that limited purpose, precisely because the traditional definition of marriage is a union of partners of the opposite sex.

Of course, statutory classifications do not serve legitimate state interests when adopted for their own sake, out of animus toward a disfavored group. . . . Here, however, the majority itself expressly disclaims any suggestion "that the current marriage provisions were enacted with an invidious intent or purpose." . . .

I also disagree with the majority's premise that, by assigning different labels to same-sex and opposite-sex legal unions, the state discriminates directly on the basis of sexual orientation. The marriage statutes are facially neutral on that subject. They allow all persons, whether homosexual or heterosexual, to enter into the relationship called marriage, and they do not, by their terms, prohibit any two persons from marrying each other on the ground that one or both of the partners is gay. . . .

The marriage statutes may have a disparate impact on gay and lesbian individuals, insofar as these laws prevent such persons from marrying, by that name, the partners they would actually choose. But . . . a facially neutral statute that merely has a disparate effect on a particular class of persons does not violate equal protection absent a showing the law was adopted for a discriminatory purpose. . . .

There is no evidence that when the Legislature adopted [the laws limited marriage to a man and a woman] they did so ""because of""" its consequent adverse effect on gays and lesbians as a group. On the contrary, it appears the legislation was simply intended to maintain an age-old understanding of the meaning of marriage. Indeed, California's adoption of pioneering legislation that grants gay and lesbian couples all the substantive incidents of marriage further dispels the notion that an invidious intent lurks in our statutory scheme. . . .

. . .

Considering the current status of gays and lesbians as citizens of 21st-century California, the majority fails to persuade me we should now hold that they qualify, under our state Constitution, for the extraordinary protection accorded to suspect classes.

The concept that certain identifiable groups are entitled to extra protection under the equal protection clause stems, most basically, from the premise that because these groups are unpopular minorities, or otherwise share a history of insularity, persecution, and discrimination, *and are politically powerless*, they are especially susceptible to continuing abuse by the majority. Laws that single out groups in this category for different treatment are presumed to "reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these reasons, *and because such discrimination is unlikely to be soon rectified by legislative means*," the deference normally accorded to legislative choices does not apply. . . .

Recognizing that the need for special constitutional protection arises from the political impotence

of an insular and disfavored group, [state] courts [in Washington and Maryland] holding that sexual orientation is not a suspect class have focused particularly on a determination that, in contemporary times at least, the gay and lesbian community does not lack political power. . . .

In California, the political emergence of the gay and lesbian community is particularly apparent. In this state, the progress achieved through democratic means—progress described in detail by the majority—demonstrates that, despite undeniable past injustice and discrimination, this group now "'is obviously able to wield political power in defense of its interests.'" . . .

Nor are these gains so fragile and fortuitous as to require extraordinary state constitutional protection. On the contrary, the majority itself declares that recent decades have seen "a fundamental and dramatic transformation in this state's understanding and legal treatment of gay individuals and gay couples". . . , whereby "California has repudiated past practices and policies that denigrated the general character and morals of gay individuals" and now recognizes homosexuality as "simply one of the numerous variables of our common and diverse humanity." . . . Under these circumstances, I submit, gays and lesbians in this state currently lack the insularity, unpopularity, and consequent political vulnerability upon which the notion of suspect classifications is founded.

. . .

. . . [W]e should consider whether, despite a history of discrimination, a particular group remains so unpopular, disfavored, and susceptible to majoritarian abuse that suspect-class status is necessary to safeguard its rights. I would not draw that conclusion here.

Accordingly, I would apply the normal rational basis test to determine whether, by granting same-sex couples all the substantive rights and benefits of marriage, but reserving the marriage label for opposite-sex unions, California's laws violate the equal protection guarantee of the state Constitution. By that standard, I find ample grounds for the balance currently struck on this issue by both the Legislature and the People.

First, it is certainly reasonable for the Legislature, having granted same-sex couples all substantive marital rights within its power, to assign those rights a name other than marriage. After all, an initiative statute adopted by a 61.4 percent popular vote, and constitutionally immune from repeal by the Legislature, defines marriage as a union of partners of the opposite sex.

Moreover, in light of the provisions of federal law that, for purposes of federal benefits, limit the definition of marriage to opposite-sex couples . . ., California must distinguish same-sex from opposite-sex couples in administering the numerous federal-state programs that are governed by federal law. A separate nomenclature applicable to the family relationship of same-sex couples undoubtedly facilitates the administration of such programs.

Most fundamentally, the People themselves cannot be considered irrational in deciding, for the time being, that the fundamental definition of marriage, as it has universally existed until very recently, should be preserved. As the New Jersey Supreme Court observed, "We cannot escape the reality that the shared societal meaning of marriage—passed down through the common law into our statutory law—has always been the union of a man and a woman. To alter that meaning would render a profound change in the public consciousness of a social institution of ancient origin." . . .

If such a profound change in this ancient social institution is to occur, the People and their representatives, who represent the public conscience, should have the right, and the responsibility, to control the pace of that change through the democratic process. . . .

. . .

CONCUR: JUSTICE CHIN.

JUSTICE CORRIGAN, concurring and dissenting.

. . .

. . . Under California law, domestic partners have "virtually all of the same substantive legal benefits and privileges" available to traditional spouses. . . . I believe the Constitution requires this as a

matter of equal protection. However, the single question in this case is whether domestic partners have a constitutional right to the name of "marriage."

. . .

In *Perez v. Sharp* (1948) . . . , we struck down a law prohibiting interracial marriages. The majority places great reliance on the Perez court's statement that "the right to marry is the right to join in marriage with the person of one's choice." . . . However, Perez and the many other cases establishing the fundamental right to marry were all based on the common understanding of marriage as the union of a man and a woman. . . . The majority recognizes this, as it must. . . . Because those cases involved the traditional definition of marriage, they do not support the majority's analysis. The question here is whether the meaning of the term as it was used in those cases must be changed.

What is unique about this case is that plaintiffs seek both to join the institution of marriage and at the same time to alter its definition. The majority maintains that plaintiffs are not attempting to change the existing institution of marriage. . . . This claim is irreconcilable with the majority's declaration that "[f]rom the beginning of California statehood, the legal institution of civil marriage has been understood to refer to a relationship between a man and a woman.". . . The people are entitled to preserve this traditional understanding in the terminology of the law, recognizing that same-sex and opposite-sex unions are different. What they are not entitled to do is treat them differently under the law.

The distinction between substance and nomenclature makes this case different from other civil rights cases. The definition of the rights to education, to vote, to pursue an office or occupation, and the other celebrated civil rights vindicated by the courts, were not altered by extending them to all races and both genders. The institution of marriage was not fundamentally changed by removing the racial restrictions that formerly encumbered it. Plaintiffs, however, seek to change the definition of the marital relationship, as it has consistently been understood, into something quite new. They could certainly accomplish such a redefinition through the initiative process. As a voter, I might agree. But that change is for the people to adopt, not for judges to dictate.

. . .

The legitimate purpose of the statutes defining marriage is to preserve the traditional understanding of the institution. For that purpose, plaintiffs are not similarly situated with spouses. While their unions are of equal legal dignity, they are different because they join partners of the same gender. Plaintiffs are in the process of founding a new tradition, unfettered by the boundaries of the old one.

. . . The fact that plaintiffs enjoy equal substantive rights does not situate them similarly with married couples in terms of the traditional designation of marriage. Society may, if it chooses, recognize that some legally authorized familial relationships unite partners of the same gender while others join partners of opposite sexes. There is nothing pernicious or constitutionally defective in this approach.

. . .